Supreme Court, U.S.
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No. 00-342

In The

Supreme Court of the United States

TAIWAN, et al.,

Petitioners,

vs.

TEI YAN SUN and YEH HWA SUN, individually and as Personal Representatives of PETER SUN, Deceased, and PHILIPE SUN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EUGENE A. BRODSKY, ESQ.
Counsel of Record
BRODSKY, BASKIN & MILLER, INC.
221 Main Street, Suite 1325
San Francisco, CA 94105
Tel: (415) 543-1111

Counsel for Respondents, Tei Yan Sun and Yeh Hwa Sun, individually and as Personal Representatives of Peter Sun, Deceased, and Philipe Sun

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether Petitioners must satisfy federal policy against piecemeal review and Supreme Court Rule 11, which permits interlocutory review only in cases of "imperative public importance."

2. Whether Petitioners' request that this Court clarify *Saudi Arabia v. Nelson*, 507 U.S. 3419 (1993), to provide "guidance for the lower courts" is necessary or proper in the present litigation.

3. Whether the conflict between this matter and *Saudi Arabia v. Nelson*, 507 U.S. 3419 (1993), that Petitioner describes actually exist?

4. Whether Petitioners' discussion of *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841 (5th Cir. 2000) misstates the Fifth Circuit's holding and invents a circuit division which does not exist.

LIST OF PARTIES

Tei Yan and Yeh Hwa Sun, individually and as personal representatives of Peter Sun, are the father and mother, respectively, of Peter Sun, who died while swimming in the waters off Little Bay Beach, in Ken Ting National Park, Taiwan. Philipe Sun is Peter's brother. The Sun family shall be referred to throughout as "the Suns."

Petitioners are as listed in the caption, and shall be referred to throughout as "Petitioners," or "Taiwan."

Defendant Chinese Youth Corps has been dismissed from this case. Otherwise, the list of parties before this Court are identical to those in the proceedings below.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Tei Yan Sun and Yeh Hwa Sun, individually and as personal representatives of Peter Sun, deceased, and Philipe Sun, respectfully pray that the petition for writ of certiorari be denied.

OPINIONS BELOW

The ruling on appeal by the United States Court of Appeals for the Ninth Circuit reversing and remanding the case is reported at 201 F.3d 1105 (9th Cir. 2000), and was reproduced as Appendix A to the Petition for Writ of Certiorari. The first order of the United States District Court for the Northern District of California granting Taiwan's motion to dismiss, with leave to amend, is found in Petition, App. B. The second order from the District Court is found in Petition, App. C. The Ninth Circuit's denial of Taiwan's petition for rehearing is found in Petition, App. D.

JURISDICTION

The jurisdiction of the District Court was invoked under 28 U.S.C. § 1330, granting the district court's original jurisdiction in actions against a foreign state, as defined in 28 U.S.C. § 1603(a). It is undisputed that Petitioners are foreign sovereigns within the meaning of section 1603(a). This court has jurisdiction under 28 U.S.C. § 1254(1). The United States Court of Appeals for the Ninth Circuit decided this case on February 3, 2000 and

denied Taiwan's petition for rehearing on June 2, 2000. Taiwan's petition for writ of certiorari is timely under Supreme Court Rule 13.3.

THE FEDERAL STATUTE INVOLVED

The Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of United States or of the States in any case . . .
>
> (2) in which the action is based upon commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

STATEMENT OF THE CASE

Tei Yan and Yeh Hwa Sun requested an application on behalf of their son, Peter, for the Study Tour in response to Taiwan's advertisement in a Chinese-American newsletter. Taiwan provided this application through the Chicago office of the Coordination Council for Northern American Affairs (hereinafter "CCNAA"). The Suns submitted the application to CCNAA's San Francisco office. Taiwan accepted Peter Sun into the program, and

sent a brochure containing an itinerary. The itinerary included an excursion to Little Bay Beach at Ken Ting National Park. Unbeknownst to Peter and his family, this beach is the location of severe weather conditions, including typhoons, which cause dangerous waves, strong currents, and undertow. Taiwan knew or should have known about these conditions when it scheduled the excursion to Little Bay Beach and promoted the excursion in the United States. Nevertheless, Taiwan did not disclose these facts in any of the literature that it distributed in the United States. Attendance was required at each of the scheduled activities.

Peter Sun and many of the other students in his group went swimming in the waters off Little Bay Beach. The designated swimming area was indicated by buoyed ropes. Peter Sun was swimming in this area when he was overcome by the waves, current, and undertow. Two of his fellow students attempted to rescue him, but the dangerous water conditions thwarted their efforts, and Peter Sun drowned.

The Suns filed their First Amended Complaint in the District Court, alleging one cause of action for negligence, which Taiwan moved to dismiss. The District Court granted the motion with leave to amend the complaint and conduct further discovery. Accordingly, the Suns filed their Second Amended Complaint. On Taiwan's motion to dismiss, the District Court held that Taiwan engaged in commercial activity. However, the Court granted Taiwan's motion to dismiss the complaint, holding that the Suns' claims were not based upon commercial activity in the United States.

The Suns appealed this ruling to the Court of Appeals for the Ninth Circuit. On appeal, the Suns argued that "like other tour organizers, Taiwan was under an affirmative duty to exercise reasonable care by disclosing known information concerning prospective dangers and by not misleading prospective participants." *Sun v. Taiwan*, 201 F.3d 1105, 1110 (9th Cir. 2000). The Ninth Circuit agreed with the District Court that Taiwan was engaged in commercial activity. *Id.* at 1108. The Ninth Circuit further held that the Suns' complaint encompassed their theory that Taiwan, like any commercial tour promoter, had a duty to disclose known dangers to tour applicants. *Id.* at 1110. Therefore, the Ninth Circuit remanded the case to the District Court to determine whether the Suns claims were based upon Taiwan's commercial activities in the United States. Taiwan petitioned the Ninth Circuit for rehearing, which was denied and this petition for writ of certiorari followed.

The Suns file this brief in opposition because Taiwan's petition is premature in that it seeks interlocutory review without justification under Supreme Court Rule 11 and the federal policy against piecemeal review. In addition, the Suns argue that the Ninth Circuit's decision does not conflict with this Court's decision in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), and is in harmony with other circuit decisions.

REASONS FOR DENYING THE PETITION

I. PETITIONERS FAIL TO DISCUSS, MUCH LESS SATISFY, FEDERAL POLICY AGAINST PIECEMEAL REVIEW AND SUPREME COURT RULE 11, WHICH PERMITS INTERLOCUTORY REVIEW ONLY IN CASES OF "IMPERATIVE PUBLIC IMPORTANCE."

The crucial threshold issue before this Court is not, as Petitioners (hereinafter "Taiwan") contend, the application of the Foreign Sovereign Immunities Act and the test articulated in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). Instead, it is whether Taiwan has satisfied Supreme Court Rule 11, entitling it to an interlocutory review of the Ninth Circuit's decision, remanding the action to the district court. Respondents (hereinafter "the Suns") respectfully suggest that the petition for writ of certiorari in this case is premature, and should therefore be denied.

In *United States v. Nixon*, 418 U.S. 683, 690 (1974), this Court stated its views concerning interlocutory appeals:

> The finality requirement of 28 U.S.C. § 1291 embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals. *See, e.g., Cobbledick v. United States*, 309 U.S. 323, 324-326 (1940). This requirement ordinarily promotes judicial efficiency and hastens the ultimate termination of litigation.

This policy is embodied in Supreme Court Rule 11:

> A petition for writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be

> granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.

Notwithstanding this established policy, Taiwan seeks precisely the sort of review that Congress and this Court have viewed with considerable, and justifiable, caution. In its Petition, Taiwan inexplicably fails to even use the word "interlocutory," and similarly fails to cite or discuss *Nixon* and Supreme Court Rule 11.

On appeal before the Ninth Circuit, the Suns argued, *inter alia*, that Taiwan

> promoted and marketed a Study Tour in the United States without informing plaintiffs and Peter Sun that hidden dangers lurked in the required activities – dangers known only to those defendants. *Appellants' Opening Brief* at 28.

The Suns asserted that Taiwan had an affirmative duty to disclose known dangers in the tour that it marketed in the United States. *Id.* at 29-30. Thus, in failing to disclose known dangers in the promotional materials, Taiwan breached this duty in the United States. *Id.* at 29.

The Ninth Circuit held that the Suns' complaint encompassed this theory and remanded the wrongful death case to the district court for a determination of whether the Suns had established that their claim against Taiwan was based on activities occurring in the United States. *Sun v. Taiwan*, 201 F.3d 1105, 1110 (9th Cir. 2000). The Ninth Circuit noted that it had not decided Taiwan's arguments that the case should be dismissed under the Act of State doctrine or forum non conveniens. *Id.* at 1110, n.3.

After remand, a Case Management Conference was held on August 25, 2000 before the district court. At that conference, the district court, *sua sponte*, granted leave to the Suns to file a third amended complaint, which was thereafter filed on September 1, 2000. At this conference, Taiwan advised the court that it intended to move to dismiss the Suns' complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Taiwan filed their motion in the District Court on September 21, 2000.

In their Third Amended Complaint [Appendix A] the Suns allege that California law, as well as generally applicable principles of tort law, imposed upon Taiwan "an affirmative duty to exercise reasonable care in the United States by disclosing known information concerning prospective dangers on the Tour and by not misleading prospective participants in the Tour." In addition, Taiwan "had a duty to exercise reasonable care in the United States in arranging a tour itinerary and not to make negligent misrepresentations in the United States. . . . " *Third Amended Complaint* ¶¶ 16-17. The Suns further allege that Taiwan breached this duty in the United States by distributing an itinerary and rules that promoted the tour and its activities as being "tightly structured, closely supervised, and safe." *Third Amended Complaint* ¶ 18. Absent from these representations of safety were any mention of facts, known to Taiwan at the time of promotion in the United States, that Taiwan closed Little Bay Beach to the public because of severe undertow, high waves, and strong surf. *Id.*

Since the remand, the district court has yet to consider any of the issues raised in the Ninth Circuit. Furthermore, the hearing on Taiwan's motion to dismiss the

Third Amended Complaint is scheduled for October 27, 2000. This Court's decision in *Nixon*, as well as Supreme Court Rule 11, require that the district court be allowed to first determine these issues, before the case becomes ripe for appellate review by either the Ninth Circuit for a second time, or by this Court.

Taiwan has similarly failed to sustain its Rule 11 burden to prove that "the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Indeed, Taiwan does not even attempt to make this argument in its Petition. Even if, *se arguendo*, there were any merit to Taiwan's arguments for review, it does not justify the disruption, delay and expense that will ensue if review is granted at this stage in the litigation. *United States v. Nixon*, 418 U.S. 683, 690 (1974), *Cobbledick v. United States*, 309 U.S. 323, 325 (1940) (stating that the policy against piecemeal appellate review avoids "the obstruction to just claims that would come from permitting the harassment and costs of a succession of separate appeals . . . ").

II. PETITIONERS REQUEST THAT THIS COURT CLARIFY *SAUDI ARABIA v. NELSON*, 507 U.S. 374 (1993) TO PROVIDE "GUIDANCE FOR THE LOWER COURTS" IS NEITHER NECESSARY NOR PROPER IN THE PRESENT LITIGATION.

Petitioners summarize the issue raised by their petition for a writ of certiorari as follows:

> The primary issue raised by this petition, therefore, is what does "based upon" mean in 28

> U.S.C. § 1605(a)(2) and precisely what analysis should courts employ to determine whether a claim against a foreign sovereign is "based upon" a jurisdictionally significant act.

Petition for Certiorari (hereinafter "Petition"), p. 12.

However, Taiwan acknowledges that the issue upon which they seek clarification was not even reached by the *Nelson* Court because, in that case, no commercial activity took place in the United States:

> The *Nelson* Court specifically did not determine what it means for a foreign sovereign to have "substantial contact" with the United States. 28 U.S.C. § 1603(e). "Because we conclude that the suit is not based upon any commercial activity by petitioners, we need not reach the issue of substantial contact with the United States." *Nelson*, 507 U.S. at 356. This Court could reach that issue in this case thereby providing guidance to the lower courts.

Petition, p. 10. In contrast, the District Court in this case held that the activities of Taiwan in advertising, promoting, marketing, and selling the Tour in the United States *did* constitute commercial activity. Petition, Appendix B, p. 22. The Ninth Circuit affirmed this holding, which Taiwan does not challenge in its Petition. *Sun v. Taiwan*, 201 F.3d 1105, 1108 (9th Cir. 2000). Since the *Nelson* Court did not find such commercial activity in the United States, Taiwan's assertion that further clarification is needed on an issue which was never reached in *Nelson* can only be construed as requesting an advisory opinion from this Court.

As noted, the guidance Taiwan seeks relates to the definition of the words "based upon" in § 1605(a)(2) of the FSIA which provides jurisdiction over the foreign state where " . . . the action is based upon commercial activity carried on in the United States by the foreign state . . . . " In *Nelson*, the court interpreted the "based upon" language by stating "the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." 507 U.S. 349, at 357 (1993). The Ninth Circuit in this case specifically recognized and followed the forgoing interpretation by the Supreme Court in *Nelson*, stating:

> The Supreme Court has explained that the phrase "based upon" "is read most naturally to mean those elements of a claim that, if proven, would entitle the plaintiff to relief under his theory of the case." *Nelson*, 507 U.S. at 357, 113 S.Ct. 1471. The Ninth Circuit has specified that this requires a nexus between the action and the commercial activity. "The commercial activity relied upon . . . to establish jurisdiction must be the activity upon which the lawsuit is based. The focus must be solely upon those specific acts that form the basis of the suit." *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 796 (9th Cir. 1989) (citations and quotations omitted);
>
> * * *
>
> An action is based on commercial activity in the United States if *an element* of the plaintiff's claim consists of conduct that occurred in commercial activity carried on in the United States. *Sugimoto v. Exportadora De Sal, S.S. De C.V.*, 19 F.3d 1309, 1311 (9th Cir. 1994) (emphasis added). The

> entire case need not be based on the commercial activity of the defendant. *See Nelson*, 507 U.S. at 358 n.4, 113 S.Ct. 1471.

201 F.3d 1105, 1109 (9th Cir. 2000). In seeking "guidance to the lower courts," petitioners argue that "many of the lower courts cite *Nelson*, but then do not systematically apply the test." Petition, p. 10. (Citations omitted.) "Still other courts do not refer to the test at all." Petition, p. 11. (Citations omitted.) Accordingly, Taiwan once again seeks certiorari not because the Ninth Circuit in its decision below failed to apply the "test" in *Nelson*, but because other courts either have done so inadequately or not at all. Thus, even assuming that clarification of the language employed in *Nelson* may at some time be appropriate, it is clear from petitioners' own arguments that this is not the case which calls for such clarification and "guidance."

Taiwan even appears to argue, for the first time, that the "elements" test set forth in *Nelson* should be overruled, stating:

> In addition, determining where each element of a cause of action occurred is difficult and susceptible to a variety of interpretations. Prior to *Nelson*, there was no reason to decide where an element of a cause of action occurred, so there was no preexisting body of case law. By contrast, there are hundreds of years of case law to help courts determine the situs of a tort or contract (citations omitted).

Petition, p. 14.

If Taiwan is now arguing that Nelson should be overruled, and a different test applied entirely, they are

raising an issue which was never argued or considered below, either in the District Court or the Ninth Circuit.

Taiwan further argues that "Taiwanese law should apply," asserting that "the Ninth Circuit did not, however, analyze the elements of the claim under applicable Taiwanese law." Petition, p. 15. The record on appeal, however, contains no showing of applicable Taiwanese law and, in fact, this argument likewise has never been raised before.[1] It is clearly improper on a petition for certiorari.

III. NO CONFLICT EXISTS BETWEEN THIS MATTER AND *SAUDI ARABIA V. NELSON*, 507 U.S. 374 (1993).

As noted above, the Ninth Circuit recognized and applied the definition of "based upon" set forth in *Saudi Arabia v. Nelson*, stating that, if *an element* of the Suns' claim is found in conduct that occurred in such commercial activity in the United States, jurisdiction would lie under the FSIA. *Sun v. Taiwan*, 201 F.3d 1105, 1109 (9th Cir. 2000). As correctly stated by the Ninth Circuit, it was the Suns' argument below that Taiwan, like other tour organizers:

> . . . was under an affirmative duty to exercise reasonable care by disclosing *known information*

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[1] Petitioners' only reliance on Taiwanese law is their argument before the District Court that Taiwan's statute of limitations for wrongful death applies. Before petitioning this Court for certiorari, Taiwan has never argued that the elements of the Suns' cause of action should be analyzed under Taiwan's tort law.

> concerning prospective dangers on the tour and by not misleading prospective participants. Moreover, the Suns allege that Taiwan's requirement, *made known to the Suns in the United States,* that their son participate in the beach trip without disclosing the dangers constitutes the basis for their action for negligent misrepresentation (emphasis added).

Id. at 1110.

This situation, of course, is entirely different from the facts in *Nelson,* where there was absolutely no showing that action by Saudi Arabia in the United States or information known to Saudi Arabia in the United States had anything to do with the subsequent kidnaping, imprisonment and torture of Nelson in Saudi Arabia. As summarized by the Supreme Court, the only "failure to warn" allegation in *Nelson* was the alleged duty to warn " . . . that if he attempted to report safety hazards the hospital would likely retaliate against him and the Saudi Government might detain and physically abuse him without legal cause." 507 U.S. at 354. There is no evidence that this potential hazard in *Nelson* was ever mentioned or considered in the United States.

This distinction was clearly recognized by the Ninth Circuit when it stated:

> The Suns' action is not a failure to warn claim as characterized by Taiwan. Under the Suns' legal theory, tour organizers have a duty of care which arises from their arrangement and promotion of the trip. This is not the same as the attempt by plaintiffs in *Nelson,* criticized by the Supreme Court, to turn their intentional tort claim into a failure to warn claim. The Suns'

> point is not that tour organizers have a duty to warn of negligent acts, but rather that there is a duty to take reasonable care in arranging a tour itinerary.

201 F.3d at 1110, n.2.

IV. PETITIONERS' DISCUSSION OF *KELLY V. SYRIA SHELL PETROLEUM DEV. B.V.*, 213 F.3D 841 (5TH Cir. 2000) MISSTATES THE FIFTH CIRCUIT'S HOLDING AND INVENTS A CIRCUIT DIVISION WHICH DOES NOT EXIST.

Taiwan relies on *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841 (5th Cir. 2000) in its attempt to show the existence of a division in the federal circuit courts, which requires a resolution by this Court. Taiwan asserts that the Fifth Circuit's holding in *Kelly* is in apparent conflict with the Ninth Circuit's holding in *Sun*. In fact, these two opinions are entirely consistent with one another. Even if, *se arguendo*, there is some degree of uncertainty in the test articulated in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), this case is certainly not the appropriate vehicle for that clarification.

In *Kelly*, American firefighters who specialized in petroleum fires were killed in Syria. *Kelly*, 213 F.3d at 844. Their employer, a Texas company named WB&C, had contracted with the Syrian government to send the firefighters to combat oil and gas leaks from Syrian wells. *Id.* The plaintiffs in *Kelly* claimed that the contract between Syria and WB&C gave rise to a duty of care owed to them by the defendant, an agency of the Syrian government. *Id.* at 852. This duty required Syria to supervise the work and set safety standards for workers at the sites of oil

wells in Syria. *Id.* Kelly argued that this contractual duty between WB&C and Syria created the nexus to the United States required under *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993). *Kelly*, 213 F.3d at 852. Kelly further argued that the breach of this contractual duty was the legal cause of the firefighters' deaths. *Id.* at 853.

The Fifth Circuit disagreed that Kelly's action was based upon activity occurring in the United States. *Id.* While the contract detailing Syria's responsibilities was made with an American company, the contract could not be the basis of Kelly's claim because the firefighters were neither parties to, nor third-party beneficiaries[2] of, that contract. *Id.* Therefore, any duty owed to the firefighters had to be found in another source. *Id.* Since Kelly's claim was based on negligence, some element of that cause of action had to be found in the United States for jurisdiction to lie under the FSIA. *Id.* However, all of the elements of the negligence claim arose entirely in Syria. *Id.* In this context, the Fifth Circuit concluded that "arguably commercial activities that preceded" defendant's negligence in Syria did not give rise to jurisdiction under the FSIA. *Id.* (quoting *Saudi Arabia v. Nelson*, 507 U.S. 349, 358 (1993)). The Fifth Circuit's reasoning implies that jurisdiction might have been found if the *Kelly* plaintiffs had

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[2] "As noted, appellants did amend their complaints to claim breach of contract. But, because they do not challenge the ruling that they are not third-party beneficiaries of the WB&C contract or the B&C work order, they have *apparently abandoned their claim [that] they have standing to sue for breach of contract.* Instead, their focus on appeal seems to be that the WB&C contract establishes the requisite duty element for their negligence claims." *Kelly*, 213 F.3d at 853 (emphasis added).

been parties to, or third-party beneficiaries of, the contract between WB&C and Syria. *Kelly*, 213 F.3d at 853. Similarly, if an element of Kelly's negligence claim had occurred in the United States, as is the case in *Sun*, jurisdiction would lie under the Fifth Circuit's reasoning.

This conclusion is supported by the overwhelming weight of the relevant authorities. *See, e.g., Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 892 (5th Cir. 1998), *cert. denied*, 525 U.S. 1041 (1998). Thus, "[a]n action is based on commercial activity in the United States if *an element* of the plaintiff's claim" consisted of conduct that occurred in the United States. *Sun v. Taiwan*, 201 F.3d 1105, 1109 (9th Cir. 2000) (citing *Sugimoto v. Exportadora De Sal, S.S. De C.V.*, 19 F.3d 1309, 1311 (9th Cir. 1994) (emphasis added). Unlike *Kelly*, the Suns allege duty and breach elements [*See* part I, *supra*] consisting of conduct that occurred in the United States.

CONCLUSION

Taiwan seeks interlocutory review of the Ninth Circuit's decision but has failed to satisfy the federal policy against piecemeal review and Supreme Court Rule 11. Taiwan improperly requests clarification of *Saudi Arabia v. Nelson*, not because the Ninth Circuit below failed to apply the "based upon" definition set forth in that case, but because the other circuits have allegedly failed to do so. In addition, Taiwan's arguments that the Ninth Circuit's decision in *Sun* conflicts with *Saudi Arabia v. Nelson*

and *Kelly v. Syria Petroleum Dev. B.V.* are unavailing. Analysis of these cases reveals that the Ninth Circuit's decision in *Sun* is entirely consistent with this Court's precedent, as well as cases from her sister circuits. Taiwan's petition should therefore be denied.

Respectfully submitted,

EUGENE A. BRODSKY
BRODSKY, BASKIN & MILLER, INC.
221 Main Street, Suite 1325
San Francisco, CA 94104
Telephone: (415) 982-7315

Counsel of Record for Respondents, Tei Yan Sun, Yeh Hwa Sun, Individually and on Behalf of Peter Sun, Deceased, and Philipe Sun

APPENDIX A

EUGENE A. BRODSKY, ESQ., SB#36691
JENNIFER FIORE, ESQ., SB#203618
BRODSKY, BASKIN & MILLER, INC.
221 Main Street, Suite 1325
San Francisco, CA 94105
Telephone: (415) 543-1111
Facsimile: (415) 543-1118

PAUL GARY STERLING, ESQ., SB#135640
STERLING & CLACK
101 Howard St., Suite 400
San Francisco, CA 94105
Telephone: (415) 543-5300
Facsimile: (415) 543-3335

Attorneys for Plaintiffs:
TEI YAN SUN, YEH HWA SUN and PHILIPE SUN

IN THE UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF CALIFORNIA

TEI YAN SUN and YEH HWA SUN, Individually and as Personal Representatives of PETER SUN, DECEASED, AND PHILIPE SUN, Plaintiffs, v. THE GOVERNMENTAL	NO. C 94-2769 SI **THIRD AMENDED COMPLAINT FOR PERSONAL INJURIES AND WRONGFUL DEATH**

AUTHORITIES ON TAIWAN (also known as the "REPUBLIC OF CHINA"; also known as "TAIWAN"), TAIPEI ECONOMIC AND CULTURAL REPRESENTATIVE OFFICE IN THE U.S. (Formerly known as the "COORDINATION COUNCIL FOR NORTHERN AMERICAN AFFAIRS"), and OVERSEAS CHINESE AFFAIRS COMMISSION,

Defendants.

Plaintiffs allege as follows:

1. Plaintiffs Tei Yan Sun and Yeh Hwa Sun are the surviving parents of Peter Sun, the decedent. Plaintiff Philipe Sun is the brother of the decedent. Plaintiffs are United States citizens residing in Palatine, Illinois.

2. The decedent, Peter Sun, was, at the time of his death on August 8, 1993, twenty-two years of age, a graduate of Purdue University, and enrolled in the Masters of Science program for the Fall 1993 semester at that University.

3. That defendant GOVERNMENTAL AUTHORITIES ON TAIWAN (also known as "REPUBLIC OF CHINA"; also known as "TAIWAN") (hereinafter "Taiwan"), is a foreign state as defined by 28 U.S.C. §1603(a),

which maintains offices in the United States, including San Francisco, California, and, through defendant agencies and instrumentalities, engages in commercial activities in the United States.

4. Defendant TAIPEI ECONOMIC AND CULTURAL REPRESENTATIVE OFFICE IN THE U.S. ("TECRO") (Formerly known as the "Coordination Council for North American Affairs") ("CCNAA")[1], was established to function as a "Taiwan instrumentality" created " . . . to render or provide or to receive or accept from Taiwan, any performance, communication, assurance, undertaking, or other action . . . " in accordance with §3309(a) of the Taiwan Relations Act (22 U.S.C. §3301, et seq.) and §1-204 of Executive Order No. 12143, dated July 22, 1979 (44 F.R. 37191).

5. Defendant TECRO (CCNAA) is an instrumentality of Taiwan and an agent of CHINA YOUTH CORPS ("CYC") and co-defendants, OVERSEAS CHINESE AFFAIRS COMMISSION ("OCAC"), and Taiwan. In this capacity, TECRO (CCNAA) was engaged in activities that were an integral part of the Overseas Chinese Youth Language Training & Study Tour to the Republic of China ("Tour"), a tourist venture aimed at youth, consisting of language and cultural education as well as sightseeing and travel. The activities of the TECRO (CCNAA) in the United States with regard to the Tour include the following: making news announcements in Chinese

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[1] On October 10, 1994, the Coordination Counsel of Northern American Affairs ("CCNAA") officially changed its name to the Taipei Economic and Cultural Representative Office in the U.S. ("TECRO").

newspapers of the availability of the Tour; distributing the Tour application forms; transmitting the application forms to the OCAC for eligibility screening; acceptance and notification to applicants; acceptance of tuition payments; distribution of an acceptance brochure; distribution of the briefing notice re the Study Tour; and, conduct of the briefing prior to the accepted applicants' departure for Taiwan.

6. At all relevant times, defendant OCAC, a cosponsor of the Tour, was a branch of the Executive Yuan (Cabinet) of defendant Taiwan, overseeing Taiwan's policy relating to persons overseas of Chinese descent. The OCAC utilizes other governmental "instrumentalities" of Taiwan to assist it with the Tour applications process. The OCAC also provides staff members to supervise the operation of the Tour and is responsible for engaging other governmental agencies of Taiwan to assist with the Tour.

7. CYC, a cosponsor of the Tour, was originally an entity of the government of Taiwan and was reorganized in 1989 as a nonprofit foundation and corporation under the laws of Taiwan. Under the supervision of the OCAC, the CYC ran the day to day operation of the Tour. Its duties included the providing of four to six members to administer the Tour and the selection of approximately 100 university students to aid in the conduct and operation of the Tour.

8. CYC and Defendants TECRO (CCNAA) and OCAC were acting at all times, individually and collectively, as representatives, agents and instrumentalities of defendant Taiwan, were integral in the application process and the day to day operations of the Tour, including

staff selection and training, preparation of the Tour itinerary, selection of tour destination, supervision, and enforcement of Tour rules and guidelines.

9. The jurisdiction of this Court over defendants Taiwan, TECRO (CCNAA) and OCAC is based upon 28 U.S.C. §1330(a), granting the District Court original jurisdiction in actions against a foreign state, as defined in 28 U.S.C. §1603(a), for any claim *in personam* with respect to which the foreign state is not entitled to immunity.

10. Pursuant to 28 U.S.C. §1605(a)(2), defendants Taiwan, TECRO (CCNAA) and OCAC are not immune from jurisdiction of the Courts of the United States in that defendants have engaged in a commercial activity (referred to herein as the "Tour") carried on in the United States; that this action is based upon activities performed in the United States in furtherance of such commercial activities, including, but not limited to advertising, soliciting, selecting and enrolling citizens of the United States, and accepting payment of tour fees; and are responsible for their negligent acts outside of the United States in connection with such commercial activity, specifically, the drowning death of Peter Sun.

11. During the early part of 1993, decedent Peter Sun and plaintiffs were solicited by defendants through advertisements in Chinese-American newspapers to participate in a tourist venture aimed at youth of Chinese descent, consisting of language and cultural education as well as sightseeing and travel. For consideration of $400, defendants agreed to provide room and board, instruction in Chinese language and culture, and to arrange

supervised travel to selected locations in Southern Taiwan.

12. Plaintiffs and decedent were supplied with a Tour brochure that, *inter alia*, indicated that participants were required to attend all scheduled activities, were prohibited from absenting themselves from any recreational activity without adequate reason, and that participants' Tour activities were to be strictly controlled and supervised by a staff specially selected and trained by defendants, and provided a detailed tour itinerary covering the entire period of the Tour from June 3 to August 15, 1993.

13. The Tour included a supervised sightseeing and cultural excursion to the Southern portion of Taiwan, which included a specifically described swimming activity at the Ken-Ting National Park, Taiwan, scheduled for August 8, 1993.

14. On August 8, 1993, defendants took the Tour participants, including the decedent, to the beach at Ken-Ting National Park for an afternoon of swimming. Decedent and other participants were given permission to enter the water by defendants' staff and without any warnings concerning hazardous conditions. The decedent was unable to read or comprehend the Chinese language and relied upon defendants' staff to translate any warning signs or posters and to provide information concerning sea conditions and hazards.

15. Decedent, and a large number of fellow tour participants, with defendants' actual and constructive knowledge and consent, in full view of defendants' staff entered the water for the purpose of swimming. While

swimming, the decedent was pulled away from shore by a strong undertow in the water, struck by massive waves and swept offshore where he drowned.

16. As organizers of the Tour, defendants were under an affirmative duty to exercise reasonable care in the United States by disclosing known information concerning prospective dangers on the Tour and by not misleading prospective participants in the Tour.

17. Defendants had a duty to exercise reasonable care in the United States in arranging a Tour itinerary and not to make negligent misrepresentations in the United States to plaintiffs and the decedent regarding the safety of the Tour itinerary, including a required swimming activity at Ken-Ting Beach.

18. Defendants breached the foregoing duties in the United States in that defendants provided a written Tour itinerary and Tour rules which represented that the Tour, and all of its activities, were tightly structured, closely supervised, and safe without making a full, or any, disclosure to plaintiffs and the decedent of information which was known, or should have been known, regarding dangers inherent in the required swimming activity at Ken-Ting National Park including, but not limited, to the following:

(A) That Ken-Ting Beach was not officially open to the public as a beach for swimming and that the Taiwan Department of Interior had not issued a permit for use of the area as a swimming beach;

(B) That the Taiwan Department of Interior at Ken-Ting Beach did not provide lookouts or life guards,

lifesaving equipment, including life preservers, life jackets, or rescue boats;

(C) That Ken-Ting Beach was unprotected and exposed to severe undertow, high waves, and strong surf.

19. The death of decedent Peter Sun was directly and legally caused by the defendants' negligence and breach of duty as aforesaid.

20. Prior to his death, decedent experienced extreme pain, suffering, and emotional distress, during his unsuccessful efforts to save himself from drowning and immediately before his death.

21. By reason of the death of Peter Sun, it was necessary for plaintiffs to, and they did, incur funeral expenses for the proper disposition of the remains of said decedent.

22. By reason of the death of Peter Sun, plaintiffs have suffered a loss of financial support from and have been deprived of the society, services, comfort, care and protection of the decedent.

WHEREFORE, plaintiffs pray for judgment against defendants as follows:

1. For general damages for conscious pain and suffering of the decedent prior to his death in the sum of $250,000;

2. For damages to decedent's heirs, parents, next of kin, and persons dependent on decedent's financial support, society, services, comfort, cure and protection for his wrongful death in the sum of $5,000,000.00;

3. For interest as provided by law;

4. For plaintiffs cost of suit, and

5. For such other and further relief as the Court may deem just and proper.

Dated: August 30, 2000

BRODSKY, BASKIN & MILLER, INC.
/s/ Eugene A. Brodsky

Eugene A. Brodsky
Attorneys for Plaintiffs
TEI YAN SUN,
YEH HWA SUN and
PHILIPE SUN